

Convenience Retailing, LLC  
Petitioner

\* Before the Zoning Board of  
\* Howard County, Maryland  
\* Zoning Board Case No. 1067M

\* \* \* \* \*

### DECISION AND ORDER

On September 19, September 26, October 3, November 7, and December 12, 2007, and January 9, 2008, the Zoning Board of Howard County considered the petition of Convenience Retailing, LLC, for approval of an amendment to the Zoning Map of Howard County to reclassify approximately 1.0 acre of property described in the petition (the "subject property") from the B-1 District to the PEC (Planned Employment Center) District and to approve a documented site plan for a gasoline service station, car wash and convenience store on the subject property.

The notice of the hearing was advertised, the subject property was posted, and the adjoining property owners were mailed notice of the hearing, as evidenced by the certificates of advertising, posting and mailing to adjoining property owners, which were made part of the record. Pursuant to the Zoning Board's Rules of Procedure, all of the reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning, and the Planning Board's recommendation, were made part of the record. The Department of Planning and Zoning and the Planning Board recommended approval of the petition and the documented site plan.

### SUMMARY OF TESTIMONY

1. Mr. Louis Raymon testified that he supported the petition because the proposed gas station was more convenient to the Waverly Woods community than the other nearest gas stations, the architecture of the buildings was attractive and the facility will have a carwash that

is close to residences in the community. He testified that the Petitioner has promised to shield lighting of the property, to prohibit overnight car repairs, and to provide sufficient stormwater management.

2. Mr. Jim Birch testified that he is the president of the Fairway Courtyards Community Association, but wasn't representing the association. He believes that the majority of Waverly Woods residents favor the petition. With regard to the potential for crime, he stated that the Petitioner has promised excellent security. He supports the petition because the Petitioner informed him that all mechanical work will be done inside and will not involve keeping cars overnight. Mr. Birch stated that he also supports the petition because Petitioner has promised a special area for towel drying, no large signs, the architecture is attractive and he was impressed with the Petitioner's other station in Columbia. He believes that the gas station/convenience store is a better use for the property than a fast food restaurant.

3. Mr. Frank Hayes testified that he is president of the Fairways Courtyards II Homeowners Association, but wasn't representing the association. He stated that he has a direct view of the stormwater management pond. He is supportive of the application because the Petitioner has been cooperative addressing their concerns and has promised that there will be no large signs.

4. Ms. Lisa Joss testified that she and her husband were patrons of the Petitioner's gas station at the Cradlerock Way location. She now considers Waverly Woods her neighborhood. She would like a gas station for convenience. She stated that the nearest gas station is off Route 40 approximately five miles away and that it is inconvenient.

5. Mrs. Ellen Rhudy testified that she lives approximately one mile from the site. She believes that the burgeoning of the Courtyards development has brought change to the area.

A gas station is appropriate for the community and won't bring crime to the village center because crime is already there. A gas station will improve vibrancy and assist the existing business in the village center to survive.

6. Mr. Thomas Garland stated that he owns a commercial office condominium in Waverly Woods and feels that a more convenient location for a service station is needed.

7. Mr. Thomas Simmons, President of Kimco's Mid-Atlantic Region, testified that Kimco had recently sold the Waverly Woods village center. Kimco retains a financial interest in Convenience Retailing, LLC. He testified that there are private covenants contained in a deed conveying the village center to its current owners, which limits the size of a gas station/convenience store. A deed restriction like this is very typical of a shopping center of this type.

He also stated that there were plans for a fast food restaurant for the subject property, however, leasing of the village center was much slower than anticipated and at the time, Kimco couldn't market the subject property as a fast food restaurant. When the Petitioner approached Kimco with an offer to buy the subject property for a gas station, Kimco realized that this was the highest and best use. He also testified that the deed restriction limited the size of the convenience store, but didn't specify a location where the convenience store had to be located. He also testified that Weis Market has a "no build" area in the parking lot area in order to preserve parking at their entrance.

8. Mr. Kevin Allen testified that he acted on behalf of Kimco in negotiating the sale of the village center. He stated that McDonald's had asked to buy the site and that the site would end up as a fast food restaurant if this petition weren't granted.

9. Mr. Mickey Cornelius, Vice President of The Traffic Group, Inc., testified on behalf of the Petitioner that road capacity was acceptable and that the site had safe road access. With regard to capacity, Mr. Cornelius stated that several road improvements had been required of the developers of Waverly Woods and that a County capital project was planned to widen Marriottsville Road from Route 99 to Route 40. With these planned improvements in place, the intersection of Warwick and Birmingham Way and the entrance to the shopping center would operate at Level of Service A in the morning peak hour and Level of Service C in the evening peak hour. The subject property will utilize the existing entrances to the shopping center at Warwick Way and Birmingham Way and will be safe. There is no accident history at these intersections, site distance is adequate and the proposed use will generate only approximately 15 – 20% new trips to the road system because most traffic in and out of gasoline service stations constitutes pass-by trips.

10. Mr. Donald Jones, environmental consultant for the Petitioner, testified that the proposed gasoline service station would be environmentally safe. He stated that many of the environmental risks associated with older stations no longer exist in new stations because standards regulating the use are more strict. Gasoline stations are required to have double walls on tanks and lines, leak detection systems, liquid sensors in the ground, alarms, regular compliance audits, tri-annual inspections by the state and emergency shutoffs. He stated that it is very rare for a new station to have a tank rupture or break due to the fiberglass construction and dual walls of the newer tanks.

11. Melanie Moser, a land planner and landscape architect, testified in support of the Petition. She stated that she had examined the history of the Waverly Woods development, the Technical Staff Report in this case and participated in the 1993 rezoning of this property.

She testified that Waverly Woods was the first mixed use project in Howard County and was initiated in the 1990 General Plan. She stated that the current General Plan defines a "neighborhood" as a residential community with its own identity and definable boundaries. She believes that the neighborhood extends to the west side of Marriottsville Road to the Alpha Ridge Landfill, Route 70 on the south, Route 99 on the north, and from Marriottsville Road east to the boundary of the subject property. She testified her delineation of the neighborhood included the entirety of the development as originally planned and had been used in prior zoning cases.

Ms. Moser testified that rezoning was justified because there had been a change in the character of the neighborhood. Zoning changes within the neighborhood included Zoning Board Case Nos. 1003M, 1018M, 1027M, and 1037M. Zoning Board Case No. 1003M changed the zoning of a parcel directly across Birmingham Way from the subject property from R-SA-8 (single-family attached) to the POR (Planned Office Research) District. Zoning Board Case Nos. 1018M and 1027M changed the PEC District to the PSC District for residential age-restricted housing. While Case Nos. 1003M, 1018M and 1027M were decided prior to the last comprehensive rezoning, Case No. 1037M was decided after the 2004 comprehensive rezoning. Zoning Board Case No. 1037M involved a request to amend the documented site plan approved in Zoning Board Case No. 1003M to increase the density of the project by 60 dwelling units. Ms. Moser testified that Waverly Woods has been developed with significantly more residential uses rather than the employment uses envisioned by the original rezoning approval. This shift to residential rather than employment has resulted in a substantial change in the character of the neighborhood.

Ms. Moser testified the County Council made a mistake in reaffirming the B-1 zoning for the subject property in the 2004 comprehensive rezoning. She testified that the I-70 corridor was initially supposed to have been an employment corridor. This concept failed because no market for employment existed at the time and because Howard County did not extend water and sewer to the area. This is evidenced by the rezonings from PEC to the PSC and POR zones. The Council should have been aware that Waverly Woods would develop with residential uses which would generate a need for a gas station. In addition, the Council should have recognized the trend toward including gas stations within village centers. There were gas stations in many of the village centers in Columbia.

12. Mr. Craig Ward, a civil engineer with Frederick Ward & Assoc., testified that he prepared the Petitioner's documented site plan. He has previously designed the majority of Exxon stations in the County before Exxon's merger with Mobile. He stated that the storm drainage for the site is adequate and incorporates "best practices" for stormwater management. He also copied the architectural design of the existing village center and incorporated the design on both the front and rear of the building. Landscaping will be adequate and compatible with the design of the center.

13. Mr. Richard Levitan, co-owner of Convenience Retailing, LLC, testified in support of the Petition. He began in the service station business in the 1990's and now operates three gas stations in village centers, including the Dorsey Search Village Center, the Owen Brown Village Center and one in Baltimore. He stated that the demographic information that he obtained showed that the residential population in Waverly Woods had been increasing significantly. In 2005, demographic information prepared by Kimco showed 1,600 people

within a 1-mile radius of the village center and today the same demographics showed 2,500 people within the same area.

He testified that he wasn't able to build the convenience center to the current industry standard size because of the restriction contained in the deed for the village center. He wasn't sure whether the gas station could be built at another location in the village center, but other locations would be less desirable because it wouldn't be a pad site. Locating the station elsewhere in the village center would create circulation issues, would place the station too close to the community and could block other tenants in the center.

14. Ms. Eileen Powers, Zoning Counsel, submitted copies of the Decision and Orders in Zoning Board Case Nos. 1003M, 1018M, 1027M, and 1037M into evidence in the case. She stated that all of the zoning cases occurred prior to the last comprehensive rezoning in 2004 with the exception of Case No. 1037M, decided in the fall of 2004 immediately after the comprehensive rezoning. She also stated that Case Nos. 1018M and 1027M were floating zone cases, which required a finding of compatibility with the existing rezoning. The only post-comprehensive rezoning case within the neighborhood is Case No. 1037M. This case, however, did not rezone the property because it was only a change in a documented site plan, therefore, the Zoning Board was not required to make a finding of change or mistake in the case.

She also stated that the Council did look at this neighborhood at the time of the last comprehensive rezoning because it comprehensively rezoned two parcels within the neighborhood.

15. Mr. Joseph Rutter testified on behalf of the Protestants. He is the former director of Planning and Zoning for Howard County. He testified that Zoning Board Case No. 1003M, which occurred before the last comprehensive rezoning, was a petition to change the zoning from

RSA-8 to POR and was conditioned on developing residential uses on the property. The remaining rezoning cases were either floating zone cases or documented site plan cases, both of which required a finding of compatibility with the surrounding neighborhood and, therefore, could not be a basis for change in the neighborhood.

He also testified that he agreed with DPZ that there had been no mistake in the last comprehensive rezoning. He also stated that the development of gas stations in village centers is no longer a trend.

#### FINDINGS OF FACT

1. The subject property consists of approximately 1.00 acre and is located entirely within the Waverly Woods Village Center.
2. The subject property is currently zoned B-1 and is a pad site situated adjacent to the existing parking lot for the Village Center.
3. The Petitioner proposes to construct buildings on the subject property consisting of 2,800 square feet of service bays, 680 square feet of administrative space, a 1,000 square foot convenience store and a carwash.
4. The neighborhood is coextensive with that set forth in the Technical Staff Report.
5. The comprehensive rezoning for property including the subject property was approved on April 13, 2004 in Council Bill 75-2003.
6. In 1993, the subject property was rezoned from the R (Rural) Zone to the B-1 zone pursuant to Zoning Board Case No. 929S (a documented site plan case), which established the mixed-use development known as Waverly Woods.
7. The County Council reaffirmed the original B-1 zoning in the 2004 comprehensive rezoning.



8. The eastern portion of the village center is within the PEC District, which permits an automobile service station as a conditional use.

9. There have been three rezoning cases within the neighborhood. These include Zoning Board Case No. 1003M, Zoning Board Case No. 1018M and Zoning Board Case No. 1037M. Zoning Board Case Nos. 1003M and 1018M were approved prior to the last comprehensive rezoning. Zoning Board Case No. 1037M was approved immediately after the last comprehensive rezoning.

10. Zoning Board Case No. 1003M approved the rezoning of approximately 2.32 acres of land directly across Birmingham Way from the subject property from RSA-8 (Residential-Single Family Attached) to POR (Planned Office Research) and was accompanied by a documented site plan showing multi-family housing for the elderly.

11. Zoning Board Case No. 1018M reclassified approximately 53 acres of land from the PEC to the PSC District. The documented site plan approved in this case permitted the development of 328 age-restricted housing units.

12. Zoning Board Case No. 1037M did not change the zoning of the site; rather, it approved an amendment to the documented site plan originally approved in Zoning Board 1003M to add an additional 60 dwelling units.

13. Zoning Board Cases 1003M and 1018M were decided prior to the 2004 comprehensive rezoning.

14. In 2000, the owner of the village center placed restrictive covenants in deed conveying the land in the village center which prohibited the use of any portion of the village center property for a "supermarket, grocery store or food store (other than a convenience store or gas station/convenience store not exceeding 3,000 square feet).

15. A lease dated August 11, 1997 by and between Waverly Woods Center, Inc., landlord, and Weis Markets, Inc., tenant, reserves use of some portion of the area in front of the Weis grocery store for parking.

16. Gas station/convenience stores in the surrounding area are commonly, but not exclusively, located in village centers.

17. Waverly Woods retains its character as a planned mixed-use community containing employment, retail and residential uses.

#### CONCLUSIONS OF LAW

Under the Howard County Zoning Regulations, the Petitioner for a documented site plan rezoning must show that there has been a substantial change in the character of the neighborhood or there has been a mistake in the original zoning. *Howard County Zoning Regulations* ("HCZR"), Section 100.G.1; *Howard County Code*, Section 16.204(k)(2). Under Maryland law, this burden is "onerous." *Stratakis v. Beauchamp*, 268 Md. 643, 652 (1973). It is presumed that the original zoning was well planned and designed to be permanent, and therefore, there must be strong and substantial probative evidence of change or mistake to overcome that presumption. *Boyce v. Sembly*, 25 Md. App. 43, 51 (1975). A finding of change or mistake only *permits*, but does not compel, the Zoning Board to grant the requested rezoning. *Hardesty v. Dunphy*, 259 Md. 718, 725 (1970). The Petitioner not only has the burden of presenting sufficiently strong evidence to allow the Zoning Board to find change or mistake, it also has the burden of *persuading* the Zoning Board that change or mistake has, in fact, occurred and that the rezoning to the requested use is appropriate. *Messenger v. Board of County Commissioners for Prince George's County*, 259 Md. 693, 704 (1970).

In order to show that there was a mistake in the original zoning, it is necessary for the Petitioner to demonstrate that, at the time of the last comprehensive rezoning, the Council "failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension." *Howard County v. Dorsey*, 292 Md. 351 (1982). Not only does the Petitioner have the burden of proving that there were then-existing facts which the Council should have considered, it must prove which, if any of those facts were considered by the Council. *Boyce* at 52.

Alternatively, the Petitioner may show that a substantial change has occurred in the neighborhood *after* the last comprehensive rezoning. *Montgomery v. Board of County Commissioners for Prince George's County*, 256 Md. 597, 602 (1970). When weighing evidence of whether substantial change in the neighborhood has occurred, the Council may take into account changes occurring before the last comprehensive rezoning but only where *additional changes thereafter* resolve what had been a close question in the minds of the Council at the time of the last comprehensive rezoning. *Town of Somerset v. County*, 229 Md. 42, 48 (1962).

Based on the foregoing findings of fact and the legal standards governing the Board's decision in this case, the Zoning Board makes the following conclusions of law:

1. The evidence presented by the Petitioner is insufficient to persuade the Board that the neighborhood, as defined in the Technical Staff Report, has substantially changed since the last comprehensive rezoning. The one zoning change occurring after the last comprehensive rezoning, Zoning Board Case No. 1037M, did not require a determination of change or mistake because it was an amendment to a documented site plan. Because the only criteria for approval

before the Board were the factors set forth in HCZR Section 100.G.2.d, which include a required finding of compatibility with the surrounding area, the decision reaffirms that additional residential dwelling units added to the property directly across the Birmingham Way from the subject property were *compatible* with, and not in derogation of, the existing character of the surrounding neighborhood.

The remaining zoning changes presented by the Petitioner all occurred before the last comprehensive rezoning. While the Board may in certain circumstances take them into account, to do so would not be appropriate in this case because one of the changes, Zoning Board Case No. 1018M, was a floating zone case. Floating zones require a finding that placement of the zone at a particular location is compatible with the existing neighborhood. Therefore, approval of a floating zone does not form a basis for substantiating change. *Wahler v. Montgomery County Council*, 249 Md. 62, 68 (1968). In addition, the Zoning Board in Case No. 1003M was also a document site plan case. The Zoning Board based its decision in that case on a finding of mistake, not change, and also found that the residential development approved under the documented site plan was compatible with the neighborhood. The evidence presented at the public hearing in this case supports the fact that Waverly Woods continues to be a mixed use community including employment, retail, and residential uses as originally planned. Because the decisions in Zoning Board Case Nos. 1003M, 1018M and 1037M deemed additional residential density to be compatible with the existing planned community and did not change the "mixed-use" nature of the original zoning, the Board determines that these zoning cases do not substantiate that there has been a change in the neighborhood and do not warrant "looking back" before the last comprehensive rezoning in this case. Based on the evidence presented, the Board is not persuaded that any shift changing the percentage of different land uses within mixed-use

community has sufficiently changed the character of that neighborhood enough to overcome the presumption of correctness of the original zoning.

2. Nor has the Petitioner set forth sufficient evidence of mistake to convince the Board that the 2004 comprehensive rezoning was in error. The Board finds that, while it is a common practice to include gas stations in village centers, the evidence presented shows that some village centers do not have gas stations and there are gas stations, such as at least one of those closest to this site, that are not located in village centers. The Board is not persuaded on the evidence before it that there is a "trend" that should be accommodated by a change in rezoning. Further, there is sufficient additional land both in the PEC half of the Village Center and the B-1 portion of the Village Center to accommodate the proposed use. No evidence was presented as to how much of that land was restricted by the lease to the Weis grocery store. Even assuming, which the Board does not in this case, that all remaining land is subject to self-imposed restrictive covenants prohibiting its use as a gas station and convenience store, the Board does not find rezoning of subject property under these facts appropriate, especially where the private restrictions are dependent on which type of retail tenants occupy the village center. Basing land use decisions on the private covenants in this case, self-imposed and possibly temporal in nature, could operate to dilute the presumption of validity given to original zoning. Finally, the Petitioner provided no evidence as to which facts, if any, the Council did or did not consider relative to the subject property at the time of the last comprehensive rezoning.

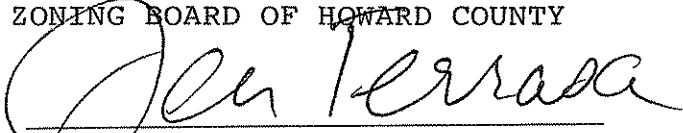
3. Because the Board has concluded that the Petitioner has failed to adduce sufficient evidence to justify rezoning based on change or mistake, it does not reach the criteria for approval of the documented site plan contained in Section 100.G.2.d of the HCZR.

WHEREFORE, for the foregoing reasons, it is this 17<sup>th</sup> day of April, 2008, hereby ORDERED by the Zoning Board of Howard County, Maryland that the Petition in the above-captioned case be, and hereby is, DENIED.

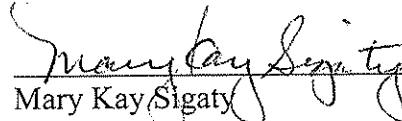
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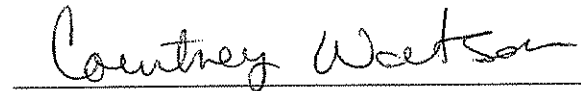
  
Robin Regner  
Administrative Assistant


ZONING BOARD OF HOWARD COUNTY

  
Jen Terrasa, Chairperson

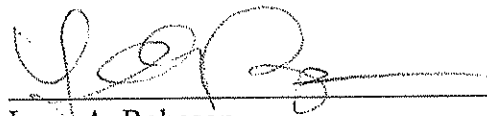
  
Calvin Ball, Vice Chairperson

  
Mary Kay Sigaty

  
Courtney Watson

  
Greg Fox

Approved for form and legal sufficiency  
this 2<sup>nd</sup> day of April, 2008:

  
Lynn A. Robeson  
Senior Assistant County Solicitor